HALF-BREED LAND AND MONEY SCRIP: WAS THIS A CONSTITUTIONALLY VALID METHOD OF EXTINGUISHING THE CLAIM TO INDIAN TITLE?

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I. INTRODUCTION

With the spread of Imperial expansion, beginning in the 16th century, the colonial powers came into contact with the aboriginal inhabitants of the newly visited soil. Spurred on by the vast wealth that could be accumulated, the various states set up colonies and claimed sovereignty to the areas which they designated as belonging to them through discovery.

This encroachment by the Imperial powers necessarily affected the rights of the Aborigines to their homeland. This paper will attempt to review a portion of the consequent conflict and the resultant legality of remedying that conflict. In addition, this paper is not meant to be conclusive due to limited research material and time restraints.

II. HISTORICAL CONSEQUENCES OF THE IMPERIAL ENCROACHMENT

There have been numerous books and articles written about the origins of Indian title and the recognition of this Title or Right by the Imperial powers.[1] The majority by far, revolve around the Indian treaties and do not extensively examine the issuance of scrip to the half-breed in extinguishment of Indian title.

As this paper is directly related to the British Imperial expansion it is important to keep in mind that Britain had, very early in its dealings with the Indians, recognized the concept of aboriginal rights.[2] These rights were re-affirmed in the Royal Proclamation of 1763.

> Just as the leading American cases on aboriginal rights developed from an analysis of the policies and practices of the colonizers of North America, the leading Canadian document on Indian rights, the Proclamation of 1763, reflects the

> pre-existing policies and practices of the British Government and colonists.[3]

As well, in 1670 a Charter was given to the Hudson's Bay Company. Included in this Charter was the exclusive right to carry on trade in the designated area and to establish such laws and regulations as were necessary for that purpose.[4] While the Charter was still operative, several treaties were ratified with the Indians and from "their conduct ..., it may be implied that the Company recognized aboriginal title as a fetter upon their own title".[5]

> An outline of some of the leading authorities from Confederation to the present will serve to reiterate the proposition that the aboriginal rights of native peoples have always been conceded and that those rights may not be interfered with without both consent and compensation:
>
> (a) 1869-70 - The purchase of the Hudson's Bay Company's territories and the acquisition of the North-western Territory. The Federal Government accepted responsibility for any claims of the Indians to compensation for land in Rupert's Land and the North-western Territory.
>
> (b) 1870 - The Manitoba Act granted land to settle the Metis' aboriginal claims.[6]
>
> (c) 1871-1930 - The numbered treaties and their adhesions speak of the Indians conveying land to the Crown. As the Order-in-Council for Treaty No. 10 demonstrates, the treaty-making was done with a concept of aboriginal title clearly in mind:
>
> "On a report dated 12th July, 1906 from the Superintendent General of Indian Affairs, stating that the aboriginal title has not been extinguished in the greater portion of that part of the Province of Saskatchewan which lies north of the 54th parallel of latitude and in a small adjoining area in Alberta ... that it is in the public interest that the whole of the territory included within the boundaries of the Province of Saskatchewan and Alberta should be relieved of the claims of the aborigines; and that $12,000 has been included in the estimates for expenses in the making of a treaty with Indians and in settling the claims of the half-breeds and for paying the usual gratuities to the Indians."

(d) 1872 - The first Dominion Act dealing with the sale of Crown land. Section 42 states:

"None of the provisions of this Act respecting the settlement of Agricultural lands, or the lease of timber lands, or the purchase and sale of mineral lands, shall be held to apply to territory the Indian title to which shall not at the time have been extinguished."

This provision remained in the various Dominion Lands Acts until 1908.

. . . .

(g) 1879 - The Dominion Lands Act authorized the granting of land in the Northwest Territories to satisfy "any claims existing in connection with the extinguishment of the Indian title, preferred by half-breeds..."

. . . .

(m) 1946 - The evidence of Mr. R.A. Hoey, Director of the Indian Affairs Branch, May 30, 1946, before the Joint Committee of the Senate and House of Commons:

"From the time of the first British settlement in New England, the title of the Indians to lands occupied by them was conceded and compensation was made to them for the surrender of their hunting grounds ... this rule, which was confirmed by the Royal Proclamation of October 7, 1763, is still adhered to."

. . . .

(p) 1971 - The Dorion Commission Report expressly recognizes aboriginal rights, urges an expansive view of the content of aboriginal title and acknowledges the need to compensate native peoples for the extinguishment of their native rights.[7]

As seen above, both the Manitoba Act, 1870 and the Dominion Lands Act, 1879 made provision for the extinguishment of the half-breed claim to aboriginal title. The method selected by the Dominion Government was totally different from that accorded the Indians with whom they treated. The half-breeds were given land and money scrip which was only applicable to dominion lands. As well, this scrip was for a limited amount,

varying from 160 acres to 240 acres.[8]

Whereas the treaties set apart communal tracts of land and added legislative safeguards, the scrip issued to half-breeds were for specific amounts of land and were made fully alienable. As a consequence the vast majority of the land fell into the hands of speculators and left the half-breeds more destitute than they previously were.[9]

Land scrip was made directly applicable solely to the half-breed recipient. Only he or she could register the scrip in exchange for the land selected. However, the majority of the half-breeds never registered the scrip. This scrip was registered by the speculator who would appear with any Indian person who was readily available. To facilitate the transaction, the speculator could either have a transfer or quit-claim signed by the half-breed or else forge his or her signature, which was generally a mark, i.e. "X".

There was also provision for non-assignability but this was later repealed. There was however, provisions for power-of-attorney which provided an avenue to defraud the half-breed.

As for money scrip, the certificate was in essence a bearer bond. Anyone who presented it would be able to redeem it in exchange for dominion land at $1.00 per acre. This method was chosen after considerable amount of lobbying by speculators. This, of course, greatly facilitated the ease with which speculators could operate. It is important to notice that both money and land scrip were for the same amount, i.e. both were redeemabl for $1.00 per acre. The land scrip would be for 160 acres and 80 acres and the money scrip would be for $160.00 and $80.00 redeemable at $1.00 per acre in Dominion lands.

As well, the scrip could only be applied in a surveyed area,

which in 1906 would exclude Northern Saskatchewan. There was therefore no benefit which could accrue to those who took scrip in the Treaty 10 area.

As it now stands the half-breeds are a landless people in their own home-land. In addition to this, the Federal Government has virtually abdicated its responsibility for the half-breeds under S.91(24) of the British North America Act.

III. ARE HALF-BREEDS COVERED BY THE GENERIC TERM INDIAN AS USED IN THE B.N.A. ACT, 1867?

The Indian Act, 1970, by section 12 specifically excludes those persons and their descendants who have received or have been allotted half-breed lands or money scrip.[10] The Indian Act definition of Indian, is restricted to those who are registered or entitled to be registered under that Act.[11] This then would exclude the half-breeds from the 1970 Indian Act definition.

However, it has been held by the Supreme Court of Canada that Eskimos are Indians for the purposes of the B.N.A. Act, 1867 under S.91(24).[12] The Federal Government, however, by S.4(1) of the Indian Act have specifically excluded the Eskimos from the purview of that Act. This would be sufficient authority for the proposition that you don't have to be included in the Indian Act in order to fall under the responsibility of the Federal Government by virtue of S.91(24) of the B.N.A. Act.

The remaining question is whether half-breeds are Indians for the purposes of the B.N.A. Act. The Supreme Court of Canada has not as of yet been asked to rule on this point, nor has any other court. The only case which I have encountered which deals with the definition of Indian,

is one dealing with the Indian Act. In R. v. Howson[13] the Northwest Territories Supreme Court in applying the Golden Rule, which gives the words in the statute their popular and ordinary meaning, stated that the words, "any male person of Indian blood" means any person with Indian blood in his veins, the origin of which doesn't matter.[14]

In Re Eskimos, their Lordships were of accord that the relevant time to look at in determining who was considered to be an Indian was at the time of the passing of the B.N.A. Act. Chief Justice Duff relies on historical evidence from around that period[15] and Justice Cannon looks at the pre-Confederation activity of the Provincial Legislatures.[16]

Of direct evidential value is the pre-Confederation legislation dealing with Indians. The Assembly of Canada passed specific legislation defining who was to be an Indian for the provisions of An Act for the Better Protection of the Lands and the Property of the Indians in Lower Canada.[17] Section 5 of the Act sets out the criteria:

> ..., [B]e it declared and enacted: that the following classes of persons are and shall be considered as Indians belonging to the Tribe or Body of Indians interested in such lands:
>
> First. ... All persons of Indian blood, reputed to belong to the particular Body or Tribe of Indians interested in such lands, and their descendants.
>
> Secondly. All persons intermarried with any such Indians and residing amongst them, and the descendants of all such persons.
>
> Thirdly. All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe, as entitled to be considered as such; and
>
> Fourthly. All persons adopted in infancy by any such Indians, and residing in the Village or upon the lands of such Tribe or Body of Indians, and their descendants.

The following year the Legislature repealed that definition and substituted the following:[18]

> ..., [T]he following persons and classes of persons, and none other, shall be considered as Indians belonging to the Tribe or Body of Indians interested in any such lands or immoveable property:
>
> Firstly: All persons of Indian blood, reputed to belong to the particular Tribe or Body of Indians interested in such lands or immoveable property, and their descendants;
>
> Secondly: All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians, or an Indian reputed to belong to the particular Tribe or Body of Indians interested in such lands or immoveable property, and the descendants of all such persons; and
>
> Thirdly: All women, now and hereafter to be lawfully married to any of the persons included in the several classes herein before designated; the children issue of such marriages, and their descendants.

Following Confederation, the new Dominion of Canada passed "An Act Providing the Organization of the Department of Secretary of State of Canada, and for the Management of Indian and Ordnance Lands."[19] Section 15 of that Act provided:

> 15. For the purpose of determining what persons are entitled to hold, use or enjoy the lands and other immoveable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada, the following persons and classes of persons, and none other, shall be considered as Indians belonging to the tribe, band or body of Indians interested in any such lands or immoveable property:
>
> Firstly. All persons of Indian blood, reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and their descendants;
>
> Secondly. All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or

> body of Indians interested in such lands or immoveable property, and the descendants of all such persons; and
>
> Thirdly. All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.

This legislation is a good indicator of the people whom the Framers of the B.N.A. Act had in mind. This is so because the Resolutions of the Quebec Conference in 1864, provided the framework for the B.N.A. Act, 1867. This Conference was attended by delegates from the Provinces of Canada, Nova Scotia and New Brunswick and the Colonies of Newfoundland and Prince Edward Island. Under these resolutions, "Indians and Lands Reserved for the Indians" were to remain with the Federal Government.[20]

It is submitted that the Framers of the B.N.A. Act, 1867 had not even adverted to the issuance of scrip to the half-breeds and that this course was taken because of the turn of events in 1869 in the Red River District.[21] This time-frame witnessed the Provisional Government of Manitoba in 1870 and the subsequent admittance of Manitoba as a Province into Canadian Confederation by virtue of the Manitoba Act, 1870.[22]

By virtue of S.31 of the Manitoba Act, the aboriginal rights of the half-breeds were expressly recognized:

> 31. And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, ...

As well in 1906 an Order-in-Council provided for the extinguishmen of "the aboriginal title" in Northern Saskatchewan. That it was in the

public interest that the territory involved "should be relieved of the claims of the aborigines; ..."[23]

This it is submitted, portrays that the half-breeds were viewed as a member of the aboriginal class and would fall within the words of Justice Cannon, in Re Eskimos, that the word Indians "included all the present and future aborigines native subjects of the proposed Confederation of British North America, ..."[24]

According to Cumming and Mickenberg:

> The most immediate legal effect upon those Metis who received scrip or lands is that they are excluded from the provisions of the Indian Act. As the discussion in chapter 2 indicates, these Metis are still "Indians" within the meaning of the British North America Act and the Federal Government continues to have the power to legislate with respect to this group of native people.[25]

In chapter 2 the co-authors propose that if an individual possesses sufficient racial and social characteristics to be termed a "native person", he should also be considered an "Indian" within the meaning of the B.N.A. Act.[26]

In any event the writer suggests that, as the Land Rights or Aboriginal Rights of half-breeds have not been denied, they must also be aborigines within the meaning of "Indian" as used in the B.N.A. Act, 1867.[27]

IV. WHAT ARE THE CONSTITUTIONAL RIGHTS OF THE HALF-BREEDS IF INDEED THEY ARE INDIANS UNDER THE PURVIEW OF THE B.N.A. ACT, 1867?

A. Is the Federal Government bound by the terms in the Royal Proclamation of October 7, 1763?

It is to be noted that after the revolution in Britain in 1688, the British Parliament was legislatively supreme over the King in his Privy Council.[28] In the settled colonies the inhabitants took with them those laws of the English Common Law which were applicable. Whereas in conquered colonies, the local laws remained the same, unless and until altered by the appropriate British Authorities in London. This could be either the Crown in Council or the British Parliament."[29] However, once the Crown in Council granted a representative assembly to a conquered colony, he was precluded from altering the local laws of that colony by order-in-council.[30]

This then was the situation in Quebec after the English defeated the French. By the Royal Proclamation of October 7, 1763, the King granted the new colony of Quebec a representative assembly to administer English law.[31] By this same Royal Proclamation, the King gave specific instructions as to the manner in which Indian rights were to be respected, including the procedure to be used in extinguishing Indian title to the land.[32]

> ...; but that, if at any time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall be; and in the case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they think proper to give for that purpose;

It is also to be noted that the Charter given to the Hudson's Bay Company in 1670 was not affected by conquest and will not therefore be susceptible to the same principles as that governing a conquered colony.

In the Hudson's Bay Company Territory, the Common Law principles would prevail, and even if the Indian rights were not reaffirmed by the Royal Proclamation, they would still be in force.[33] Although this issue was not fully settled with regard to British Columbia the writer submits that it is still very much alive and doing well.

> On the question of whether the Royal Proclamation created or merely recognized and confirmed, Indian title, the earlier cases were inconclusive and provided support for both possible views. For the most part the judicial utterances took the form of casual dicta which, like Lord Watson's remark in the St. Catherine's case, were made in cases where full consideration of the problem was unnecessary." One of the significant aspects of Calder therefore is that even those members of the Supreme Court who went on to find against the Nishga claim did so on other grounds and expressly refrained from concluding that non-applicability of the Proclamation to the area in question was determinative on the question of existence of Indian title.[34]

In any event, Indian title has been recognized in that area of the Hudson's Bay Company known as Ruperts Land and the Northwestern Territories. This is indicated by the treaties which were entered into and by the issuance of scrip to the half-breeds. Legislative force for this proposition is found in the Manitoba Act, 1870 and the Dominion Lands Act, 1879 as well as the Imperial Order-in-Council admitting Ruperts Land and the Northwestern Territories into the Dominion of Canada.[35]

In addition to this, the Royal Proclamation makes specific reference, as seen in the quote on page 10 supra, to Indian lands within the bounds of proprietary governments, which it is submitted would include the Hudson's Bay Company.

> In order to permit Indians who wished to sell lands situated in those areas in which the Proclamation had allowed white settlement, and

> to avoid the problem of fraud, the Proclamation enunciates a detailed prodecure by which Indians could sell their lands, but solely to the Crown. If the Indian lands were within the bounds of a proprietary government (such as the Hudson's Bay Company), the land could only be purchased...[36]

As well, the Charter of 1670 itself utilizes the terms "plantacion and Colonyes " in describing the area granted to the Hudson's Bay Company.[37] It goes on to give the Company the power to make "reasonable Lawes Constitucions Orders and Ordinances as to them ... shall seeme necessary and convenient for the good Government of the said Company..."[38]

The major issue to determine at the outset is whether or not the Colonial Laws Validity Act, 1865[39] applies to the Hudson's Bay Company.

The co-authors, Cumming and Mickenberg express the opinion that this could be the case.

> 35. Any such ordinance would have to be reasonable, in accordance with the terms of the Charter, and after 1865 would have had to conform with the provisions of the Colonial Laws Validity Act, 1865, 28 & 29 Vict., c.63 (Imp.). [40]

The best authority to consult for this purpose is the Colonial Laws Validity Act[41] itself. The definition section is especially helpful.

> 1. The term "colony" shall in this Act include all of Her Majesty's Possessions abroad, in which there shall exist a legislature as hereinafter defined, ...
>
> The terms "Legislature" and "Colonial Legislature" shall severally signify the authority ..., competent to make laws for any colony;
>
> . . . .
>
> The term "Colonial Law" shall include laws made for any colony, either by such Legislature as aforesaid or by Her Majesty in Council;
>
> . . . .

> The term "Governor" shall mean the officer lawfully administering the Government of any colony;

From the foregoing description on p. 12 supra, of the Charter granted in 1670, there exists a firm basis to conclude that the 1865 Act under discussion does apply. The Charter provides for a Governor, describes the territory as a "plantacion" or "Colonye" and also provides for the power to make, inter alia, laws for the good government of the area. Further, from the definition section, it is clear that the failure of the H.B.C. to establish a Legislative Assembly is not crucial, as it merely had to have the authority competent to make laws for the colony.

In any event, the Colonial Laws Validity Act, 1865 at the latest, would be applicable to Rupert's Land and the Northwestern Territory on July 15, 1870 by virtue of the Imperial Order-in-Council admitting that area into the Dominion of Canada.[42] This Order-in-Council simultaneously authorized the Federal Parliament to legally pass legislation which would be binding on that area ceded by the H.B.C.[43] The writer would therefore submit that the Manitoba Act, 1870, 33 Victoria, c.3 (Canada) and the Colonial Laws Validity Act, 1865 simultaneously took root in the area ceded by the Hudson's Bay Company, if in fact the 1865 Act had not previously been in full legal force.[44]

Going further still, the writer would submit that insofar as the Manitoba Act, 1870 is concerned, it was nevertheless enacted by a Legislature which was under the auspices of the Colonial Laws Validity Act, 1865 and was thereby precluded from passing legislation which would be repugnant to the laws of England which were in force in Canada.

It is certainly clear that the Colonial Laws Validity Act, 1865 applied to the Pre-Confederation Provinces, as they all had "Colonial Legislatures."[45] It is submitted that the 1865 Act applied equally to both the H.B.C. Territory and the Pre-Confederation Provinces and Colonies. However, for the purpose of this paper, it is only important to consider the area covered by the H.B.C. Charter, as this was the only location within which half-breed scrip was issued, except for that portion which fell within the Indian territory as set out in the Royal Proclamation, 1763. Scrip was not issued east of Manitoba, witnessing the treaty relations between half-breeds and the Government, as for example the Adhesion of the Half-breeds of Rainy River in Ontario, in 1875 to Treaty 3.[46]

What then would be the consequence of applying the Colonial Laws Validity Act, 1865? According to a constitutional law expert, Clement,

> It has, however, been strongly urged officially that the British North America Act, 1867, has so far modified the Colonial Laws Validity Act, 1865, in its application to Canada that Imperial Acts extending to Canada, but of date prior to 1867, may be, in effect, repealed or amended by Canadian legislation this view has not met with favour at the hands of the Imperial law officers of the Crown, and seems to be entirely opposed to the strong current of English and Canadian authority.[47]

This then necessitates the further proposition that the Royal Proclamation, 1763 has the force of an Imperial statute. In the Calder Case[48] the Supreme Court of Canada in reviewing the issue of Indian title in British Columbia made several statements in regard to the Royal Proclamation. Hall, J., in a well reasoned judgement gave a review of the cases dealing with this issue.

> Parallelling and supporting the claim of the Nishgas that they have a certain right or title to the lands

> in question is the guarantee of Indian rights contained in the Royal Proclamation of 1763. This Proclamation was an executive order having the force and effect of an Act of Parliament and was described by Gwynne J. in the St. Catharine's Milling case at p. 652 as the "Indian Bill of Rights": see also Campbell v. Hall, supra. Its force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories. It follows, therefore, that the Colonial Laws Validity Act, 1865 (Imp.), c. 63, applied to make the Proclamation the law of British Columbia. That it was regarded as being the law of England is clear from the fact that when it was deemed advisable to amend it the amendment was effected by an Act of Parliament, namely, the Quebec Act, 1774.
>
> In respect of this Proclamation, it can be said that when other exploring nations were showing a ruthless disregard of native rights England adopted a remarkably enlightened attitude towards the Indians of North America. The Proclamation must be regarded as a fundamental document upon which any just determination of original rights rests. Its effect was discussed by Idington J. in this Court in Ontario v. Canada, 42 S.C.R. 1 at 103-4, affirmed [1910] A.C. 637, ...[49]

Hall J., then makes a statement as to the method by which these "original rights" guaranteed by the Royal Proclamation could be extinguished.

> It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation. There was no surrender by the Nishgas and neither the Colony of British Columbia nor the province, after Confederation, enacted legislation specifically purporting to extinguish the Indian title, nor did Parliament at Ottawa.[50]

The writer is pursuing the proposition that it is still an open question as to the proper legislative authority to extinguish Indian title, other than by virtue of the Royal Proclamation, until the Statute of Westminster, 1931.

The Federal Goernment by virtue of section 91(24) of the British North America Act, 1867[51] has responsibility over "Indians, and Lands reserved for the Indians". But it is unclear as to whether or not this encompasses every conceivable area which affects Indians. The issue revolves around the question of whether or not the Imperial Parliament divested itself completely of the responsibility it had been faithfully upholding in regard to aboriginal people within its Empire. In referring to the Imperial Order-in-Council admitting Rupert's Land and the North-western Territory into the Union there is indication that this responsibility was retained by the Imperial Parliament.

> 14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them.[52]

It would appear from this, that the Imperial Parliament is living up to its obligations to Indian aborigines, probably keeping the provisions of the Royal Proclamation in sight. In any event, the Royal Proclamation has not been abrogated by the B.N.A. Act, 1867 as it has been consistently applied in Canadian Courts as having the force of an Imperial Statute.[53]

What then is the consequence of a Federal Government Act which would be inconsistent with the provisions of the Royal Proclamation? Clement had this to say,[54]

> And, in 1902, Lord Halsbury (in delivering the judgment of the Privy Council in a case involving the validity of an Act of the legislation of Natal, which took away, in certain cases, the right to trial by jury), used much the same language[4], adding:
>
> "The devious purpose and meaning of that statute" - the Colonial Laws Validity Act - "was to preserve the right of the Imperial Legislature to legislate even for the colony although a local legislature has

> been given, and to make it impossible, when an Imperial statute has been passed expressly for the purpose of governing that colony, for the colonial legislature to enact anything repugnant to an express law applied to that colony by the Imperial legislature itself."
>
> As colonial legislation which runs counter to an Imperial statute extending to the colony is to be read subject to the Imperial enactment, and is void to the extent of its repugnance, thereto "but not otherwise", it follows that Canadian legislatures, each within its sphere, may legislate upon the subject matter of Imperial statutes so long as the Canadian Acts are not inconsistent with the Imperial.[5]

In his book, The Statute of Westminister, 1931,[55] K.C. Wheare phrased it as follows:

> The Act of 1865 therefore lays down one criterion of repugnancy. Any Act of a colonial legislature repugnant to the provisions of an Act of the Parliament of the United Kingdom extending to the colony either by express words or by necessary intendment, or repugnant to any order or regulation made under the authority of such an Act, shall be held to be void to the extent of such repugnancy.[5]

Although a Dominion has been given its own constitution with enumerated powers, this does not preclude Imperial Statutes from having effect. In the case of Union Steamship Company v. The Commonwealth, the High Court of Australia held a Dominion Act repugnant to Imperial Legislation even though the Australian Constitution received specific powers to enact laws with respect to shipping and navigation. In his judgment the Chief Justice addressed the argument in these words:

> In my opinion, the Colonial Laws Validity Act applies to laws passed under a power given by an Imperial Act passed after that Act, as much as to laws passed under a power given by an Imperial Act passed before it.[56]

Viewed in this light, is the provision in the Manitoba Act, 1870 repugnant to the Royal Proclamation? The Manitoba Act, s.31 provides:

> 31. And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.[57]

The writer would submit that this course of action is inconsistent with the instructions in the Royal Proclamation which provides that:

> ..., [I]f at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose ...[58]

This then, gives definite guidelines as to the manner in which the disposal of Indian title is to be extinguished. In 1969, LaForest in his book entitled, Natural Resources and Public Property under the Canadian Constitution stated it thus:

> In summary the proclamation makes the following provisions regarding the lands it reserves for Indians: the Indians are not to be molested or disturbed in their possessions of such lands; the various colonial governors are not to give grants of such lands; ... and if the Indians wish to dispose of such lands, they may only be purchased in the King's name after a meeting of the Indians for that purpose...[59]

However, the author makes a further proposition that the

> ... Dominion parliament has complete legislative jurisdiction over these areas and could make whatever alterations it wished to these rights, whatever their origin may be. Consequently a careful examination of the Indian Act and any other statute applying to the territories would have to be made to determine the extent to which such rights have been altered. It is also arguable that the Dominion government may, by virtue of its rights of administration flowing from parliament's legislative power over lands reserved for Indians, make whatever alterations to these rights it may desire by executive act, so long as it does nothing inconsistent with the Indian Act or other statute. The proclamation only gives a usufructary right to the Indians 'for the present until our [that is, the Queen in council's] further pleasure be known'.[60]

It is important to note that LaForest utilizes the words, "it is also arguable that the Dominion government may" which makes it clear that he has some doubt as to this proposition. This is further evidenced by the following remark:

> It should be noted that the administration and control of Indian lands is included in the grant of legislative power.[148] This includes the right of the Crown in right of the Dominion to recover possession of reserved lands improperly in the possession of an individual,[149] and, except as modified by statute, possibly the power of abrogating the Indian title.[61]

LaForest, therefore, could possibly have in mind the paramountcy of English Law as provided for by the Colonial Laws Validity Act, 1865. Although he doesn't mention this Act, he nevertheless at page 9, submits that "prerogative rights under English law apply throughout Canada".[62]

Accordingly the writer would submit that by virtue of the C.L.V. Act, 1865 the inclusion of S.31 of the Manitoba Act, 1870 is ultra vires as being repugnant to the Royal Proclamation, 1763. Although that section

is repugnant, the rest of the Act would be valid.[63]

This, however, doesn't resolve the matter as the constitutional validity of the Federal Government to pass the Manitoba Act, 1870 was questioned. This issue was presented to the Imperial Parliament which subsequently ratified it by the B.N.A. Act, 1871. This provided inter alia,

> 5. The following Acts passed by the said Parliament of Canada, and intituled respectively, - "An Act for the temporary government of Rupert's Land and the North Western Territory when united with Canada;" and "An Act to amend and continue the Act thirty-two and thirty-three Victoria, chapter three, and to establish and provide for the government of the Province of Manitoba," shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor General of the said Dominion of Canada.[64]

It is not clear whether or not the Imperial Parliament gave particular attention to S.31 of the Manitoba Act which purported to extinguish Indian title by dividing amongst the children of half-breed heads of families, residing in that province at the time of the transfer, the 1,400,000 acres set aside for that purpose. There is also no indication that the Imperial Parliament understood that the Half-breeds receiving this land or their parents, would not be protected in their right to continue hunting, fishing and trapping in the area to which Indian title was ceded.[65]

Of special note is the last part of the section which outlines the provisions for extinguishing this title.

> ..., [A]nd the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.

It is submitted that the "conditions" as the Governor General in Council "may from time to time determine" are restricted to the powers conferred by the B.N.A. Act, 1867. This can be deducted from the issue which was to be determined by the Imperial Parlaiament, being the power of the Canadian Parliament to enact the Manitoba Act by virtue of the B.N.A. Act, 1867.[66]

It is further submitted, that the phrase "valid and effectual for all purposes whatsoever" contained in the B.N.A. Act, 1871 related to the specific and necessarily confined powers as provided for by the B.N.A. Act, 1867.

In any event, the B.N.A. Act, 1871 would prevail over the provisions of the Royal Proclamation, 1763, if indeed that was the intention. The Imperial Parliament is supreme in its field and can repeal or amend its own statutes.

> Thus Parliament may remodel the British Constitution, prolong its own life, legislate ex post facto, legalise illegalities, provide for individual cases, interfere with contracts and authorize the seizure of property, give dictatorial powers to the Government, dissolve the United Kingdom or the British Commonwealth, introduce communism or socialism or individualism or fascism, entirely without legal restriction.[67]

It therefore appears that the Federal Government may have a good basis to argue that Indian title was validly extinguished in the new Province of Manitoba. This is so notwithstanding that only children of half-breed heads of family were to participate in the grant. That merely provides for the method of extinguishment, the first part of the section indicating that the extinguishment of the whole family was intended. This of course is open to attack, as is the phrase "towards the extinguishment

of Indian Title." It is arguable that the granting of land was merely one or the first step in extinguishing Indian title.

The Manitoba Act, 1870 was the first step taken by the Federal Government to legislate in relation in half-breeds. By an Order-in-Council on April 25, 1871 the Governor in Council approved the distribution of the 1,400,000 acres to the children of half-breed heads of family.[68] By a subsequent Order in Council, provision was made for an admendment to include the heads of the families as well.[69] The amendment was embodied in An Act Respecting the Appropriation of Certain Dominion Lands in Manitoba, 1874.[70]

The next major piece of federal legislation was that passed in the 1879 Dominion Lands Act authorizing the granting of land in the North-west Territories to satisfy "any claims existing in connection with the extinguishment of Indian title, preferred by half-breeds...."[71] By sub-sequent Orders in Council the Indian title of the half-breed was purported to be extinguished in the present areas of Saskatchewan, Alberta, Northwest Territories and Manitoba, which in 1870 were outside the limits of the then Province of Manitoba.[72]

The Dominion Lands Acts, as well as the Orders in Council passed thereunder were not ratified by the Imperial Parliament.[73] On the basis of the preceding propositions the writer would submit that these pieces of Canadian Federal enactments were repugnant to the Royal Proclamation by virtue of the Colonial Laws Validity Act, 1865 and therefore ultra vires.

B. What about the Doctrine of the Supremacy of Parliament?

There does not appear to be any cases dealing with the supremacy of the Federal Parliament to abrogate or abridge Indian title to land,

although the Privy Council in the case of St. Catherine's Milling held that "lands reserved for Indians' are not synonymous with Reserves.[74]

> ... counsel for Ontario referred us to a series of provincial statutes prior in date to the Act of 1867, for the purpose of shewing that the expression "Indian reserves" was used in legislative language to designate certain lands in which the Indians had, after the royal proclamation of 1763, acquired a special interest, by treaty or otherwise, and did not apply to land occupied by them in virtue of the proclamation. The argument might have deserved consideration if the expression had been adopted by the British Parliament in 1867, but it does not occur in Sect. 91(24), and the words actually used are according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.

This case, as well as subsequent cases, went on to look at the proprietary rights, holding that the federal governments had the authority, or arguably the mandate, to extinguish the Indian title, but that the province received the fee simple.[75]

The uncertainty is created by the fact that the Imperial Parliament has not so far, revoked the Royal Proclamation's provisions as to the method of extinguishing Indian title. There is no doubt, as is seen in the Privy Council statement, that the Federal Government has been given the administrative role of carrying out the provisions of the Royal Proclamation. The writer, however, submits that until the Imperial Parliament changed the provisions in the Proclamation, that the Federal Parliament was bound by that procedure.

The other cases of relevance are the recent ones heard in the Supreme Court of Canada.[76] These cases held that the Federal Government

could "abrogate the rights of Indians to hunt whether arising from treaty or under the Proclamation of 1763 or from user from time immemorial,..."[77]

As these cases revolved around the narrow issue of hunting, they are not prima facie authority as to Parliament's power to abrogate the whole sphere of aboriginal title.

This issue however, was dealt with in the Calder case.[78] Both Justices Judson and Hall stated that Indian title could be extinguished by legislative enactment. Justice Judson ruled that the exercise of sovereignty of Indian lands by British Columbia Colonial Legislation was sufficient. Justice Hall, however, stated that this act of extinguishment could only take place by legislative enactment of the Parliament of Canada.

The writer accepts this as a valid proposition. The point still needing to be pursued is whether the Imperial Parliament retained supremacy over Indian title until the Statute of Westminister, 1931 abolished the Colonial Laws Validity Act, 1865.

For our purpose, the following two sections of the Statute of Westminister are important:

> 2. 1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.
> 2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation insofar as the same is part of the law of the Dominion.
>
> . . . .
>
> 4. No Act of Parliament of the United Kingdom

> passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that the Dominion has requested, and consented to the enactment thereof.[79]

By virtue of section 2, the proposition by Hall, enunciated in Calder is unimpeachable, and finds concrete support in the author Wheare.

> This means that it is now to be within the competence of a Dominion parliament to make laws applying to spheres which were formerly covered by Imperial legislation extending to the Dominion. The fact that any existing Imperial Act deals with any particular subject, or that any future Imperial Act may deal with that particular subject, in no way restricts the competence of the Dominion parliament to make laws regulating it, as far as its own nationals are concerned.[80]

The writer cannot find any material dealing with Imperial Acts or Imperial Orders-in-Council providing for procedures for extinguishment of Indian title, other than that provided for in the Royal Proclamation, 1763 and the B.N.A. Act, 1871, which ratified S.31 of the Manitoba Act, 1870. The writer would therefore, until the contrary is shown, submit that the issuance of scrip to half-breed Indians in extinguishment of the Indian title was repugnant to the Royal Proclamation, and therefore ultra vires by virtue of the Colonial Laws Validity Act, 1865.

V. WHAT ARE THE IMPLICATIONS OF THE LAW OF NATIONS TO THE INDIAN OR ABORIGINAL TITLE?

In 1918, the Department of State, U.S.A., requested Alpheus Snow to "undertake the task of collecting, arranging, ... authorities and documents relating to the subject of 'Aborigines in the Law and Practice of Nations.'"[81]

Mr. Snow therefore reviewed all the material which was available and subsequently submitted his report. The following passage aptly describes the enforced sovereignty of nations and their subsequent responsibilities.

> All civilized States which assume sovereignty over regions inhabited by aborigines undertake a civilizing work which, while varying in its details, is identical in its general nature and in the fundamental principles to be applied. Hence the dealings of individual civilized States with aborigines under their respective sovereignties are matters of common interest to all nations, and the law and practice of nations properly concerns itself with the common and international aspects of such national action.[82]

The author goes on to state that the

> ...[P]roblem was one of the contact of civilization with uncivilization; that there were certain general principles universally applicable, and that the question was in some respects and to some extent one of common interest to all nations.[83]

One of the judicial cases relied upon by Snow was the judgment of Chief Justice Marshall in Johnson v. McIntosh.[84] The significance of this judgment is the negative statement that a Native nation is not considered to have status as a legal entity under international law. The sovereignty enjoyed by the aboriginal inhabitants was curtailed by the imposition of European international law.

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves, that they made ample compensation to the inhabitants of

> the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated, as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right from which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented. Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.
>
> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.[85]

The judicial statements made by Chief Justice Marshall in the several judgments rendered, set the stage for subsequent judicial hearings. The Privy Council in the St. Catherine's Milling Case [86] based its judgment

on the Royal Proclamation of 1763. This same Proclamation was reviewed by Marshall, C.J., in Johnson v. MacIntosh, holding that the "title, subject only to the right of occupancy by the Indians, was admitted to be in the King, as was his right to grant that title".[87] In summing up, Marshall stated that,

> It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title charged with this right of possession, and to the exclusive power of acquiring that right.[88]

As no Canadian Court has pronounced whether the Royal Proclamation of 1763 is constitutive or declaratory, the writer submits that Chief Justice Marshall's above stated remark would lend credence to its being declaratory.

In addition, the Privy Council in In Re Southern Rhodesia, stated that,

> No doubt a Proclamation annexing a conquered territory is a well-understood mode in which a conquering Power announces its will urbi et orbi. It has all the advantages (and the disadvantages) of publicity and precision. But it is only declaratory of a state of fact.[89]

Their Lordships again in 1921 had an opportunity to view the nature of "native" title to land. The writer feels that an extensive portion of the judgment must be quoted for the purpose of giving an insight of the global view of aboriginal rights as practised by the British Imperial Parliament.

> The question which their Lordships have to decide is which of these views is the true one. In order to answer the question, it is necessary to consider, in the first place, the real character of the native title to the land.
>
> Their Lordships make the preliminary observation in interpreting the native title to land, not only

in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence. Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada.(1) But the Indian title in Canada affords by no means the only illustration of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle. Even where an estate in fee is definitely recognized as the most comprehensive estate in land which the law recognizes, it does not follow that outside England it admits of being broken up. In Scotland a life estate imports no freehold title, but is simply in contemplation of Scottish law a burden on a right of full property that cannot be split up. In India much the same principle applies. The division of the fee into successive and independent incorporeal rights of property conceived as existing separately from the possession is unknown. In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular

> community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.
>
> In the case of Lagos and the territory round it, the necessity of adopting this method of inquiry is evident. As the result of cession to the British Crown by former potentates, the radical title is now in the British Sovereign. But that title is throughout qualified by the usufructuary rights of communities, rights which, as the outcome of deliberate policy have been respected and recognized. Even when machinery has been established for defining as far as is possible the rights of individuals by introducing Crown grants as evidence of title, such machinery has apparently not been directed to the modification of substantive rights, but rather to the definition of those already in existence and to the preservation of records of that existence.[90]

Not only were Aboriginal Rights of indigenous peoples honoured by Britain and the United States. Felix S. Cohen in an article written in 1942, traces the origin of Indian Rights in the U.S.A. and Canada to Spain.[91]

> In the first place, we must recognize that our Indian law originated, and can still be most clearly grasped, as a branch of international law, and that in the field of international law the basic concepts of modern doctrine were all hammered out by the Spanish Theological jurists of the sixteenth and seventeenth centuries, most notably by the author of the lectures De Indis, Francisco de Victoria.[92]

Based on the development of International Law in the past century, of what significance is Indian title as based on its origin under the Law of Nations? In addition to this, what is the significance of the several British Dominions, such as Canada, acquiring a virtually unlimited power of Parliamentary Supremacy?

In the Calder Case[93] their Lordships place heavy emphasis on the

legislative competence of Parliament to extinguish Indian title. According to Professor Peter Cumming, the inference which can be gathered from the judgment of Justice Judson, is that the substantive law of Indian title, can be abrogated by and at the pleasure of the Crown.

> The decision of Judson, J., for the majority, held that Indian title to land was at the pleasure of the Crown, and that the Crown could deprive Indians of that title when it wished, without compensation, and apparently without formally or expressly depriving the Indians of their property rights.[94]

Assuming that Parliament did in fact abolish Indian title, without compensation, could the injured party call upon the International Court of Justice to review the matter? This of course is after all local remedies have been exhausted.

In The Cayuga Indians Claim[95] the United States- Great Britain Claims Arbitration Tribunal stated that Great Britain was the proper person to bring the claim on behalf of the Cayuga Indians in Canada because,

> ... Such a tribe is not a legal unit of International law. The American Indians have never been so regarded.... From the time of the discovery of America the Indian tribes have been treated as under the exclusive protection of the power which by discovery or conquest or cession held the land which they occupied.... They have been said to be "domestic, dependent nations," ... or "States in a certain domestic sense and for certain municipal purposes".... The power which had sovereignty over the land has always been held the sole judge of its relations with the tribes within its domain. The rights in this respect acquired by discovery have been held exclusive.... So far as an Indian tribe exists as a legal unit, it is by virtue of the domestic law of the sovereign nation within whose territory the tribe occupies the land, and so far only as that law recognizes it.[96]

From this Arbitration it would appear that Great Britain and as of the passing of The Statute of Westminister, 1931, Canada, would be the person to take the action to the International Tribunal. In addition, Indians, as defined in the Indian Act, and Inuit as of January 1, 1947 were made citizens of Canada.[97] This would therefore, at least arguably, prevent the Imperial Government taking further claims to the International Bodies on behalf of Canadian Indians. As well, the Canadian Citizenship Act will have to be studied to ascertain if Indians not covered by the Indian Act definition are indeed accorded Canadian Citizenship status. This class of persons, perhaps may still be able to rely upon Great Britain.

If Canada was therefore to abrogate Indian title, it is not conceivable that Parliament would refer the matter to an International Tribunal. This is confirmed by Canada's accepting the jurisdiction of the International Court of Justice, under the condition that Indian treaties and Canada's treatment of Indians would be excluded.[98]

In addition, the Statute of the International Court of Justice by Article 34 restricts the parties with standing, to "states".[99] The weight of judicial determination negatives the Indian Nations status as a "state".

However, it is still possible to argue that the common law doctrine of incorporation of customary international law into domestic law would provide a remedy for a unilateral abrogation of Indian title.[100]

It is therefore arguable that Aboriginal title is based upon customary international law and that this customary international law has been incorporated into both Great Britain and Canada. As such it is submitted that the unilateral action of the Federal Parliament in issuing half-breed scrip in extinguishment of Indian title is contrary to the principles of the law of nations, as well as to the procedure set forth

in the Royal Proclamation.

The remedy, it is suggested, can be derived from the relatively recent utterances of International Bodies operating under the auspices of the United Nations. It is postulated by Cumming that the Charter of the United Nations[101] and the Universal Declaration of Human Rights[102] have become part of the customary international law and is therefore binding on all states.[103] However, the more recent resolutions, such as those by the International Labour Organization, would probably not be customary international law but would nevertheless provide a good standard by which to measure Canadian law. These resolutions also point to the moral obligation of Canadians to redress the wrongs inflicted upon the aboriginal inhabitants.[104]

The Arbitration Board in the Cayuga Claims Case also discussed the doctrine of laches and held that it should not and did not apply to the Indians because of their dependent position upon the sovereign.

> ... On the general principles of justice on which it is held in the Civil Law that prescription does not run against those who are unable to act, on which in English-speaking countries persons under disability are excepted from the operation of statutes of limitation, and on which English and American Courts of Equity refuse to impute laches to persons under disability, we must hold that dependent Indians, not free to act except through the appointed agencies of a sovereign which has a complete and exclusive protectorate over them, are not to lose their just claims through the laches of that sovereign, unless, at least, there has been so complete and bona fide change of position in consequence of that laches as to require such a result in equity.[105]

It is submitted that laches would not apply against the half-breed as there is sufficient historical evidence to show an initial and continued appeal to have the injustices inflicted upon them remedied. One of these injustices includes the unilateral taking of their right to the benefit

of Indian title. In addition there certainly has not been a bona fide change of position which would bar the Half-breeds from having their rights restored. If anything, the rapid technological change has widened the disparity between the two races and is an added incentive to rectify those past inequities.

VI. CONCLUSION

The writer submits that the constitutional validity of issuing half-breed scrip in extinguishment of "Indian" or "Aboriginal" title can certainly be attacked on the basis of repugnancy to the Royal Proclamation, 1763. This would be based on the applicability of the Colonial Laws Validity Act, 1865. It is contented that the B.N.A. Act, 1867 merely gives the Federal Parliament administrative powers for, inter alia, the extinguishment of Indian title. The procedure for this extinguishment still resided in the Imperial Parliament, as embodied in the Royal Proclamation. Until this procedure was revoked by specific legislation by the Imperial Parliament or by the Canadian Parliament after the passing of the Statute of Westminster 1931, any deviation would be invalid. The only exception to this would be the Manitoba Act, 1870 which was ratified by the B.N.A. Act, 1871.

The writer further submits that one of the other approaches can be based on the activity of the International community. There has been recent activity that lends support and credibility to the aspirations of Indigenous Peoples in re-affirming and enjoying their lands and other Human Rights. The fact that Indigenous People's themselves are organizing into International bodies is also of immense benefit. This is exemplified by the recent United Nations Non-Governmental Organization meeting in Geneva, organized to hear the concerns of American Indians as represented

by the International Treaty Council.[106]

Surely the concerns raised both locally and internationally will lead to the necessary corrective steps of the current dilemma imposed upon Indigenous peoples. Canada, priding herself as being an enlightened nation, should no longer be remiss in taking positive and bona fide action.

FOOTNOTES

1. Cumming and Mickenberg, Native Rights in Canada, 2nd Ed., 1972; Snow, The Question of Aborigines in the Law and Practice of Nations, 1972; Clem Chartier, "Indian"; An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867, Law 390A, 1977, unpublished.

2. Cumming and Mickenberg, Native Rights in Canada, 2nd Ed., 1972 at 67.

3. Ibid., at 23.
   As well, on p. 30, the co-editors state that, the "Proclamation of 1763 is the formalized culmination of at least a decade of concerted British efforts and practices in dealing with the Indians. It should be quite obvious at this point that the Royal Proclamation served to promote and clarify the pre-existing and conceded rights of Indian people rather than to 'create' some 'new' native rights".

4. Ibid., at 138-139.

5. Ibid., at 142.

6. The B.N.A. Act, 1871 ratified the Manitoba Act, 1870.

7. Supra, note 2 at 276-278.

8. Chester Martin, "Dominion Lands" Policy, The Carleton Library No. 69, at 21-22.

9. Sealey and Lussier, The Metis, Canada's Forgotten People, 1975, at 97, 135.

10. R.S.C. 1970, c.I-6, s.12.

11. Ibid., s.2(1).

12. Re Eskimos, [1939] S.C.R. 104, (1939) 2 D.L.R. 417.

13. (1894) Terr. L.R. 492.

14. Ibid., at 494.
    The Court went on to state that if half-breeds weren't to be considered Indians within the meaning of the Act, then the exclusionary provisions wouldn't have been necessary. It is submitted that this argument may still prevail although the 1951 Indian Act takes out the phrase "of Indian blood".

15. Supra, note 12 at 422.

16. Ibid., at 429.

17. 13 and 14 Victoria (1850) Cap. 42.

18. 14 and 15 Victoria (1851) Cap. 59.

19. 31 Victoria (1868) Cap. 42 (Canada).

20. Supra, note 12, at 429-430.

21. Supra, note 9, at 76-87.

22. Manitoba Act, S.C. 1870, c. 3.

23. Contained in the Volume of Orders-in-Council dealing with Half-breed Land Entitlement, Index 5, 1975, A.M.N.I.S., P.C. 1459, July 20, 1906.

24. Supra, note 12, at 430.

25. Supra, note 2, at 203-204.

26. Ibid., at 9.

27. For a more comprehensive analysis of the issue of who is an Indian, see Clem Chartier, "Indian"; An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867, Law 390A, U of S, 1977, unpublished.

28. Whyte and Lederman, Canadian Constitutional Law, 2nd Ed., 1977 at 2-1.

29. Ibid., at 2-2 to 2-3.

30. Ibid., at 2-3; Campbell v. Hall (1774), 98 E.R. 1045.

31. Royal Proclamation of 1763, R.S.C. 1970, Appendices Vol., p. 123.

32. Ibid., at 127-129.

33. W.H. McConnell, Some Comments on the Nunavut Proposal, College of Law, U of S; W.H. McConnell, The Calder Case in Historical Perspective, 1973-74, 38 Saskatchewan Law Review 88, at 107.

34. K. Lysyk, The Indian Title Question in Canada: An Appraisal in the Light of Calder, 1973, LI, The Canadian Bar Review, 450 at 454.

35. See quote at pages 2-3, supra.

36. Supra, note 2 at 29.

37. Ibid., at 138-9.

38. Ibid., at 141.

39. 28 and 29 Victoria, c.63. (Imp.)

40. Supra., note 2 at 142, footnote 35.

41. Supra., note 39.

42. Order of Her Majesty in Council Admitting Rupert's Land and the North-Western Territory into the Union, June 23, 1870, found in R.S.C. 1970, No. 9, at 257.

43. Rupert's Land Act, 1868, 31-32 Victoria, c.105 (U.K.), s.5.

44. The Manitoba Act, 1870 was assented to by the Parliament of Canada on May 12, 1870.

45. Supra, note 12 at 429.

46. Coles Canadiana Collection, Indian Treaties and Surrenders, Treaty Numbers 1-138, Volume 1 at 303.

47. W.H.P. Clement, Clement's Canadian Constitution, 3rd Ed., 1916.

48. Calder v. A.G. of British Columbia [1973] 4 W.W.R. 1; (1973) 34 D.L.R. (3d) 145.

49. Ibid., at 65.

50. Ibid., at 71.

51. 30 and 31 Victoria, c. (U.K.), contained in R.S.C. 1970, No. 5 at 191.

52. Supra, note 42 at 262-263.

53. See the quotation on pages 14-15 taken from the Calder Case, Supreme Court of Canada.

54. Supra, note 47 at 58-59.

55. K.C. Wheare, The Statute of Westminister, 1931, 1933 at 34.

56. 36 C.L.R. 130 at 141.

57. Supra, note 22 at 254-255.

58. Supra, note 31 at 128.

59. G. V. La Forest, Natural Resources and Public Property under the Canadian Constitution, 1969, at 110-111.

60. Ibid., at 130-131.

61. Ibid., at 160.

62. Ibid., at 9.

63. See quote from Clement on pages 16-17 supra.

64. 34-35 Victoria, c.28 (U.K.).

65. See page 18, supra, for s.31.

66. See the Preamble to the B.N.A. Act, 1871.

67. Jennings, The Law and the Constitution, 5th Ed., 1959, at 147.

68. P.C. 874, April 25, 1871.

69. P.C. 86, April 3, 1873.

70. S.C. 1874, c.20, s.1.

71. S.C. 1879, c.31, s.125(e).

72. Supra, note 23.

73. The writer has not found any evidence to contradict this.

74. St. Catherine's Milling and Lumber Company v. The Queen (1889) 14 A.C. 46, at 59.

75. Ibid., and Dominion of Canada v. Province of Ontario [1910] A.C. 637.

76. R. v. Sikyea [1964] S.C.R. 642; R. v. George (1966) 55 D.L.R. (2d) 386 and R. v. Sigeareak (1965), 55 W.W.R., 1 (N.W.T.C.A.).

77. Cartwright, J., in his dissenting judgment in R. v. George referring to the S.C.C. adoption of Johnson, J.A.'s reasoning in R. v. Sikyea. As well, Sissons, J., in his reasoning of the various hunting cases, admitted Parliament's power to abridge or abrogate hunting rights, but that it hadn't been done.

78. Supra, note 48.

79. 22 Geo V, chap.4.

80. Supra, note 55, at 79.

81. Snow, The Question of Aborigines in the Law and Practice of Nations, 1972 at 3.

82. Ibid., at 7.

83. Ibid., at 9.

84. 21 U.S. (8 wheat.) 240 (1823).

85. Ibid., at 240 - 241.

86. Supra, note 74.

87. Supra, note 84, at 250 - 251.

88. Ibid., at 254.

89. In re Southern Rhodesia [1919] A.C. 211, at 239-240.

90. Amodu Tijani v. The Secretary, Southern Nigeria [1921] 2 A.C. 399 at 402-404.

91. Felix S. Cohen, The Spanish Origin of Indian Rights in the Law of the United States, (1942) 31 Geo. Law Jr. 1.; also for more discussion of this article see paper referred to in note 27, supra, at 1-4.

92. Ibid., at 17.

93. Supra, note 48.

94. Peter Cumming, Native Law Casebook, 1975, Osgoode Hall Law School of York University, at 191

95. The Cayuga Indians Claim (1926), Neilson American and British Claims Arbitration Reports, 203.

96. Ibid., at 307.

97. Canadian Citizenship Act, 1946 S.C. ch.15 as amended by 1956 S.C. ch.6.

98. 15 May, 1931, Commons, Vol. II, p.1628.

99. D.J. Harris, Cases and Material on International Law, 1973 at 755.

100. Supra, note 94 at 185.

101. 1945 Can. T.S. No.7.

102. G.A. res. 217 A (III) 1948.

103. Supra, note 94 at 188-189.

104. For a review of some of the more pertinent Conventions, Articles and Resolutions, see note 94 supra, at 187-211.

105. Supra, note 95 at 307.

106. The International Treaty Council operates out of the U.S.A., and has its office in New York. The International N.G.O. Conference on Discrimination Against Indigenous Populations -1977- in the Americas was held at the Palais Des Nations, Geneva from September 20-23, 1977.

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